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Honorable Ricardo S. Martinez

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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TERADATA CORPORATION, TERADATA
US, INC. and TERADATA OPERATIONS,
INC.,

No. 2:20-mc-00074-RSM

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Plaintiffs,

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**THIRD-PARTY MICROSOFT
CORPORATION'S
OPPOSITION TO PLAINTIFFS'
MOTION TO COMPEL
DISCOVERY**

v.

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SAP SE, SA AMERICA, INC., and SAP LABS,
LLC,

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Defendants.

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## I.    INTRODUCTION

The Court should deny the Teradata plaintiffs' motion to compel, filed against third-party Microsoft, because it is premature, moot, and without merit.  Microsoft's remaining production will be ready for service to Teradata on or before September 28.  But Teradata's motion does not address Microsoft's forthcoming production or any of the issues Microsoft has worked diligently with Teradata to resolve.  Instead, Teradata rushed to file this motion and now presents arguments that the parties never previously discussed and that will be mooted by Microsoft's supplemental production.  When Microsoft warned Teradata of the problems with its motion, it was unmoved, refusing to withdraw its motion.  The federal and local rules do not allow a party to simply skip over meet-and-confer requirements and this Court should not, either.

Teradata's motion fairs no better on the merits.  Microsoft has worked diligently to collect and produce responsive documents—and has already produced thousands of pages— while also working with Teradata's counsel to understand and narrow Teradata's overly broad document requests.  Microsoft's supplemental production will satisfy any remaining obligations under Rule 45.  Microsoft therefore respectfully requests that the Court deny Teradata's motion to compel.

## II.    FACTUAL BACKGROUND

### A.    Teradata Waited More than a Year to Serve an Overly Broad Subpoena.

On June 19, 2018, Teradata filed a lawsuit against SAP in the Northern District of California, asserting various antitrust claims.  *See* Case No. 3:18-CV-03670-WHO, ECF No. 1; Cross Decl. (ECF No. 1-1), Ex. 2.  Teradata does not deny that it knew Microsoft was a competitor when it filed suit.  *See* Mot. at 5.  Indeed, Teradata's motion admits there are "[v]ery few" market participants and that SAP expressly identified Microsoft during discovery.  *See* Mot. at 2-3, 5; Cross Decl., Ex. 3 at 13.

Teradata and SAP began discovery in December 2018.  Case No. 3:18-CV-03670-WHO, ECF No. 74.  On May 22 2020, more than a year later, and six months after SAP had expressly identified Microsoft in discovery, Teradata served Microsoft the subpoena at issue now.  Cross

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1  Decl., Ex. 1 at 6.  Teradata has provided no explanation for having waited over a year to seek

2  discovery from Microsoft.  Byer Decl. ¶ 16.  Instead, Teradata's approach to third-party

3  discovery began a needlessly contentious process, in which it refused to respond to Microsoft's

4  questions, focus its document requests, or extend common courtesies while Microsoft and its

5  counsel attempted to work around witness and attorney schedules in the midst of COVID-19 and

6  summer vacations.  Discovery in Teradata's lawsuit closes in January 2021.  Byer Decl., Ex. 4 at

7  2.  Teradata has identified no intermediate deadlines or need for expedition.  *Id*. ¶ 7.

8      On June 19 and 25, the parties met and conferred to discuss Microsoft's timely-served

9  objections to Teradata's document requests.  Byer Decl. ¶ 2.  Teradata explained that its

10  subpoena had two sets of requests:  requests that addressed Teradata's antitrust claims (Request

11  Nos. 1-9), and requests that addressed its patent infringement defense (Request Nos. 10-11).  *Id*.

12  Teradata agreed to identify the versions of the Microsoft products relevant to the antitrust

13  requests and to limit their 2011-to-present date range.  *Id*.  On July 9, 2020, Microsoft asked

14  Teradata for a status update on Teradata's antitrust requests, and confirmed that Microsoft had

15  completed its document collection for the patent requests.  *Id*., Ex. 1.

16      On July 13, nearly a month after the parties' first meet and confer, Teradata identified the

17  product versions at issue.  It broadly identified 28 versions of one product and "all versions" of

18  three others.  But Teradata reneged on its promise to narrow the date range, insisting instead that

19  Microsoft provide all responsive materials going back nearly ten years.  Byer Decl., Ex. 2.  Three

20  days later, Microsoft received a subpoena from SAP, seeking material that largely overlapped

21  with Teradata's request.  *Id*.  Microsoft informed Teradata that it intended to identify a search

22  that would satisfy both subpoenas because it could not "run multiple searches for the same

23  information."  *Id*.  Faced with two, uncoordinated but overlapping subpoenas, Microsoft began

24  concurrently working with Teradata and SAP to locate material responsive to both subpoenas as

25  quickly and efficiently as possible.  *Id*. ¶ 4.

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**B.      Microsoft Worked Diligently While Teradata Refused to Focus Its Requests.**

Microsoft has worked diligently to investigate, collect, review, and produce documents responsive to Teradata's subpoena despite complications imposed by COVID-19 and summer schedules.  Indeed, despite these challenges, Microsoft conducted approximately 17 interviews with Microsoft employees to assist in identifying and collecting thousands of pages of material, and has produced or is in the process of producing its responsive documents.  Howard Decl. ¶ 5.  Throughout this process, Microsoft stayed in constant communication with Teradata and repeatedly confirmed that Teradata had no case deadlines on the horizon.  Byer Decl. ¶ 7.

In particular, Microsoft produced thousands of pages of documents in response to Request Nos. 10-11.  Byer Decl. ¶ 8.  These requests encompassed historic documents, no longer available in electronic form.  Howard Decl. ¶ 6.  Because of restrictions imposed by COVID-19, Microsoft was required to ship those materials for review at its outside counsel's out-of-state home.  *Id*. ¶ 7.  Microsoft has since made two and one-half bankers boxes of material available for Teradata's inspection, along with a set of documents produced electronically.  Byer Decl., Ex. 5.

**C.      Without Meeting and Conferring, Teradata Filed This Motion to Carry Out Its Threat to Use "Public Filings" to Damage Microsoft's Reputation.**

Just four days after Teradata identified the products on which it sought discovery, Teradata claimed it could wait no longer and threatened to "seek relief from the court."  Byer Decl., Ex. 3.  When Microsoft asked whether Teradata had any impending deadlines justifying the need to "force[] Microsoft to run multiple, overlapping searches just weeks apart," Teradata identified nothing but the close of discovery in 2021.  Cross Decl., Ex. 7 at 3-5.  Microsoft also detailed its ongoing search, showing Microsoft's good faith in responding to the subpoena. *Id*. at 2-3.  Teradata responded by claiming Microsoft's status report was "unhelpful and characteristic of the foot-dragging with which you've approached this from the beginning," and threatened to use "public filings in motion practice" to damage the reputation of Microsoft as a leading software company:

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> It's also difficult to understand how one of the most sophisticated software companies in the world cannot efficiently and effectively search its own electronic documents internally as you claim. I imagine that will be quite the revelation in public filings in motion practice, and one that seems contrary to a reputation that Microsoft has cultivated over many years as a leading software company.

*Id.* at 2

On August 7, 2020, Microsoft provided Teradata another status report. Byer Decl., Ex. 5. Two weeks later, Teradata accused Microsoft of delay for having not checked in, only to later claim Teradata's outside counsel just found Microsoft's status report "in [his] spam box." Byer Decl., Ex. 6. Microsoft again asked Teradata to explain why it could not get from SAP the materials Teradata requested that Microsoft produce about SAP's communications and restrictions SAP imposes on its products. *Id.*, Ex. 7. Microsoft also stated that it "continue[s] to interview Microsoft employees who are searching for additional documents" and again asked Teradata to "let us know if you have any imminent case deadlines." *Id.*

Without responding to Microsoft's questions—and without meeting and conferring,—Teradata filed this motion. Byer Decl. ¶ 11. On September 4, 2020, Microsoft's outside counsel warned Teradata that the parties had never conducted the required meet and confer and requested Teradata withdraw its motion. Byer Decl. ¶ 13. It refused. *Id.*

**D.      Microsoft Is Producing Documents Responsive to the Antitrust Requests.**

Microsoft will complete its collection and review of documents in response to Teradata's antitrust requests on September 21, and on or before September 28 its documents will be available for production once the parties enter an appropriate protective order. Byer Decl. ¶ 12. On September 4, 2020, Microsoft described this upcoming production in detail to Teradata's counsel. *Id.* ¶ 13. Teradata has since identified no deficiencies with Microsoft's proposed supplemental production and, surprisingly, is avoiding even discussing Microsoft's upcoming production. *Id.*; see also Ex. 8 ("I understand you and Diana have discussed other aspects of your production. For this email, I'm just focusing on this one issue" related the format of Microsoft's production in response to Teradata's patent requests). Teradata's conduct means

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1   Microsoft has been required to file this response without having the benefit of first meeting and

2   conferring with Teradata to understand what, if anything, Teradata believes remains at issue.

3                               **III.    ARGUMENT**

4     **A.    Teradata Failed to Comply with Rule 37 and LCR 37.**

5         Rule 37(a)(1) requires a party moving to compel discovery to include "a certification that

6   the movant has in good faith conferred or attempted to confer with the person or party failing to

7   make disclosure or discovery in an effort to obtain it without court action." Fed. R. Civ. P.

8   37(a)(1). Local Rule 37(a)(1) additionally requires the certification to "list the date, manner, and

9   participants to the conference. If the movant fails to include such a certification, the court may

10   deny the motion without addressing the merits of the dispute." These rules require the moving

11   party to certify that the parties have (a) conducted "face-to-face or telephonic communications,"

12   (b) discussed any deficiencies perceived in the producing party's production, and (c) engaged in

13   a full discussion of the parties' positions regarding particular document requests. *See Beasley v.*

14   *State Farm Mut. Auto. Ins. Co.*, 2014 WL 1268709, at *1 (W.D. Wash. Mar. 25, 2014) (denying

15   motion to compel where plaintiff filed motion instead of responding to concerns raised by

16   defendant because a "good faith effort to resolve discovery disputes requires an exchange of

17   information until no additional progress is possible"). In other words, the certification must

18   show that the parties made a "good faith effort to resolve discovery disputes" and must confirm

19   that "no additional progress is possible." *Id.* Rushing to court without this certification is

20   improper and a violation of the rules. *Id.*; *see also Flores v. US Immigration & Customs Enf't*,

21   2019 WL 1875371, at *1 (W.D. Wash. Apr. 26, 2019) (because parties were still in the process

22   of responding to discovery requests, the parties failed to show they had met and conferred).

23         Teradata fails to certify that the parties reached an impasse on the issues Teradata now

24   raises. Nor could it—Teradata never conducted a proper meet and confer. Although Teradata

25   certifies that the "parties conferred" regarding Microsoft's initial objections to Teradata's

26   requests "in June 2020," Teradata did not certify that the parties discussed Microsoft's intended

27   production or the issues its motion to compel now raises. Instead, Teradata attempts to assert

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1   that Microsoft's various status updates and assurances that it was still searching for responsive

2   documents constitute a meet and confer.  *See* Cross Decl. ¶¶ 3-5.  They do not.  They instead

3   demonstrate Teradata's impatience for a production (despite being unable to identify any

4   deadlines in the lawsuit before 2021), and its refusal to work cooperatively with Microsoft to

5   narrow its overly broad requests, respond to Microsoft's questions, provide Microsoft a

6   reasonable opportunity to search for documents, or accommodate scheduling challenges in light

7   of COVID-19 and summer.  Indeed, had Teradata met and conferred with Microsoft before filing

8   this motion, as the rules require and as Microsoft's counsel explained after the motion was filed,

9   it would have learned that Microsoft was in the process of finalizing its supplemental production.

10  Byer Decl. ¶ 12.  Because Teradata did not and cannot provide the required certification, the

11  Court should deny this Motion.

12          **B.      Teradata's Motion Fails on the Merits.**

13          Even if Teradata could have met the certification requirement (and it could not), its

14  motion would still fail because Microsoft's upcoming production satisfies its Rule 45

15  obligations.  A party issuing a subpoena "must take reasonable steps to avoid imposing undue

16  burden or expense on a person subject to the subpoena."  Fed. R. Civ. P. 45(d)(1).  As a

17  nonparty, Microsoft is entitled to greater protection from discovery burdens than a party to the

18  underlying litigation.  *See Dart Indus. Co. v. Westwood Chem. Co.*, 649 F.2d 646, 649 (9th Cir.

19  1980); *Rollins v. Traylor Bros., Inc.*, 2017 WL 1756576, at *1 (W.D. Wash. May 5, 2017)

20  ("[D]iscovery against a nonparty is more limited than the liberal discovery against parties.");

21  *Kim v. NuVasive, Inc.*, 2011 WL 3844106, at *2 (S.D. Cal. Aug. 29, 2011) ("Non-parties deserve

22  extra protection from the courts.").  The "word nonparty serves as a constant reminder of the

23  reasons for the limitations that characterize 'third-party' discovery."  *Dart*, 649 F.2d at 649

24  (quotation marks omitted).

25          **1.      Request No. 1**

26          Teradata's Request No. 1 demands that Microsoft produce all "[d]ocuments comprising

27  or reflecting [Microsoft's] product roadmaps, promotional materials, product development plans,

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1  and marketing plans for each of the ERP Applications or EDAW Products and related services

2  that [Microsoft] offer[s]." Cross Decl., Ex. 1 at 15. Microsoft objected that, among other things,

3  this is overbroad and unduly burdensome under Rule 45. *See id.*, Ex. 5 at 3-4. Although

4  Teradata subsequently agreed "not to request product roadmaps or product development plans,"

5  it still demands promotional materials and marketing plans for each of the 28 versions of one

6  product, and "all versions" of three additional products, from January 2011 through the present.

7  *See* Mot. at 6-7; Byer Decl., Ex. 2. Requiring Microsoft to search its records for "all" marketing

8  materials for this volume of products over a span of nine years, "including any hard copies or

9  electronically stored information," would be time consuming and expensive, and would impose

10  undue burden on a third-party, especially given the information sought is irrelevant. Cross Decl.,

11  Ex. 1 at 13; Howard Decl. ¶ 8.

12       Before this motion, Teradata's only explanation for the relevance of these documents was

13  that Teradata wanted materials sufficient to show the time and resources Microsoft spent

14  developing the identified products. *See* Byer Decl. ¶ 2. Teradata's motion does not explain how

15  Microsoft's marketing materials and plans would show this. Instead, the motion presents an

16  entirely new argument on which the parties have not meet and conferred. *See* Mot. at 7.

17  Namely, Teradata now says these materials provide information on customers targeted by

18  Microsoft, competitors of the product, and product features that are important to competition. *See*

19  Kostis Decl. (ECF No. 1-2), ¶ 5. Even a basic search of Microsoft's publically available

20  marketing materials shows they often lack the information Teradata seeks. *See* Byer Decl., Ex.

21  9. By failing to target its request to what Teradata claims is relevant, the request remains

22  impermissibly broad and responding would inherently impose an undue burden. After all, "[t]he

23  compulsion of production of irrelevant information is inherently an undue burden." *Dominguez*

24  *v. Corp. of Gonzaga Univ. (Gonzaga Univ.)*, 2018 WL 3338181, at *1 (E.D. Wash. Apr. 19,

25  2018) (citing *Jimenez v. City of Chicago*, 733 F. Supp. 2d 1268, 1273 (W. D. Wash. 2010)).

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### 2.     Request No. 2

Teradata's Request No. 2 demands that Microsoft produce all "[d]ocuments reflecting or concerning any assessment or evaluation of competition between or among Microsoft, Oracle, IBM, Teradata, and SAP for ERP Applications and/or EDAW Products and all data underlying or evaluated in such assessments or evaluations." *See* Cross Decl., Ex. 1 at 15.  During the June 2020 meet and confers, Teradata explained that it sought Microsoft's competitive intelligence reports.  *See* Byer Decl. ¶ 2.  Microsoft conducted a reasonable search of its records and has the resulting reports available for production, subject to entry of a protective order.  *Id*. ¶¶ 12-13.  Although the parties have not meet and conferred regarding this production because of Teradata's refusal to do so, Microsoft believes its production of these reports moots this portion of the motion.

### 3.     Request No. 3

Teradata's Request No. 3 demands that Microsoft produce all "[d]ocuments reflecting Microsoft's wins and losses of sales of ERP Applications and EDAW Products in competition with Oracle, IBM, Teradata, or SAP, including for each win and loss an identification of the product and supplier the customer switched away from and identification of the product and supplier it switched to." *See* Cross Decl., Ex. 1 at 15.  During the June 2020 meet and confer, Teradata explained that this request seeks Microsoft's win-loss reports.  *See* Byer Decl. ¶ 2.  Microsoft conducted a reasonable search of its records and has the resulting reports available for production.  Although the parties have not meet and conferred regarding this production, again because of Teradata's refusal to engage, Microsoft believes its production of these reports moots this portion of the motion.

### 4.     Request No. 4

Teradata's Request No. 4 demands that Microsoft produce "[d]ocuments sufficient to identify [Microsoft's] top 100 customers by revenue for each of the ERP- and EDAW-based products or services [Microsoft] offer[s], the specific Microsoft ERP- or EDAW-based products or services that each such customer purchases, the amounts paid annually by each such customer

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1    for each of those ERP- or EDAW-based products or services, and when each such customer

2    began using and stopped using (for any that stopped) each of those ERP- or EDAW-based

3    products or services." *See* Cross Decl., Ex. 1 at 15.  Microsoft objected to this request because,

4    among other reasons, the request is overly broad and unduly burdensome given Microsoft is a

5    nonparty.  *Id.*, Ex. 5 at 7-8.

6         Microsoft did, however, conduct a reasonable search and identified its top 10 customers

7    for each product for each year that Teradata requested.  Howard Decl. ¶ 9.  Producing these

8    documents requires creating reports that must be manually de-duped and checked for accuracy.

9    *Id.*  Conducting an additional search for 90 smaller customers would significantly, and

10   unnecessarily, increase the burden for Microsoft, as it would result in thousands of lines of data

11   that would need to be manually reviewed, de-duped, and checked for errors.  *Id.*  This search

12   would impose undue burden on a nonparty with little to no incremental relevance for Teradata,

13   because the top customers would, inherently, include the largest customers in the market and

14   therefore, will be captured by the top 10 customers Microsoft has offered to provide.  Teradata

15   cites no evidence suggesting the relevance of Microsoft's smallest customers somehow

16   outweighs the burden that searching for and producing that information would place on

17   Microsoft, a third-party subject to the protections in Rule 45.  *See Arista Records v. Lime Grp.*,

18   2011 WL 679490, at *3 (W.D. Wash. Feb. 9, 2011) ("An evaluation of undue burden requires

19   the court to weigh the burden to the subpoenaed party against the value of the information to the

20   serving party.") (quotation marks omitted).  Indeed, because the parties have not meet and

21   conferred (again, because of Teradata's refusal to do so), Microsoft has no reason to believe

22   Teradata would refuse to accept Microsoft's forthcoming production.  As a result, Microsoft

23   believes its upcoming production moots this part of the motion.

24              **5.    Request Nos. 5 and 7**

25        Teradata's Request Nos. 5 and 7 demand that Microsoft produce all documents "relating

26   to any communications" with SAP regarding two SAP products (*see* Request No. 5), and

27   "relating to any communication" with SAP or others concerning any restrictions or prohibitions

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1  imposed by SAP in connection with two other groups of products (*see* Request No. 7).  *See*

2  Cross Decl., Ex. 1 at 16.  Microsoft objected that, among other things, communications with

3  SAP were available from SAP—the defendant in this lawsuit—and forcing a non-party to

4  produce information that is available from a party is inherently unduly burdensome and

5  inappropriate.  *See Arista Records*, 2011 WL 679490, at *2 ("There is simply no reason to

6  burden nonparties when the documents sought are in possession of the party defendant.")

7  (quoting *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 577 (N.D. Cal. 2007)); *Moon v.*

8  *SCP Pool Corp.*, 232 F.R.D. 633, 637-38 (C.D. Cal. 2005) (documents pertaining to defendant

9  could more easily and inexpensively be obtained from defendant than non-party)).  During the

10  parties' June 2020 meet and confers, Teradata argued that the Northern District of California had

11  imposed "certain limitations on eDiscovery" in its lawsuit with SAP, so Teradata wanted to

12  obtain SAP's communications from Microsoft.  Byer Decl. ¶ 2.  Microsoft has since repeatedly

13  asked Teradata to identify any efforts it made to obtain those communications from SAP.

14  Teradata has never identified any such efforts.  *Id.*

15      In a new pivot, Teradata now claims the request seeks "Microsoft's own internal

16  communications concerning SAP's [allegedly] anticompetitive" behavior.  *See* Mot. at 10.  This

17  is not what the requests asks and conflicts with Teradata's expert's admission that "Teradata has

18  limited this request to communications between Microsoft and SAP."  To the extent Teradata

19  now argues the request actually covers *Microsoft's communications* concerning SAP's

20  communications and restrictions, Teradata provides no support for the relevance of those

21  communications.  Teradata's expert argues that "[i]t is important to understand how Microsoft is

22  discussing SAP's conduct *with SAP*," not how Microsoft is discussing SAP's conduct internally.

23  *See* Kostis Decl. at 6 (emphasis added).  Further still, Teradata's latest interpretation of its own

24  requests remains fatally vague, overly broad, and unduly burdensome because Microsoft would

25  have no way to locate all emails somehow "related to" communications with SAP or restrictions

26  SAP places on its own software.  Courts routinely reject such requests, and this Court should do

27  so here, particularly given the increased protections that Rule 45 provides.  *See, e.g.*, *Cardenas v.*

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1   *Dorel Juvenile Grp., Inc.*, 230 F.R.D. 611, 623 (D. Kan. 2005) (requests for all documents

2   "'relating to' . . . a general category or broad range of documents" is facially overbroad);

3   *Woodmen of the World Life Ins. Soc'y v. U.S. Bank Nat'l Ass'n*, 2012 WL 1637246, at *13 (D.

4   Neb. May 7, 2012) (a request "couched in such broad language as to make arduous the task of

5   deciding which of numerous documents may conceivably fall within its scope" is overbroad)

6   (quotation marks omitted).

### 6.      Request No. 9

8       Teradata's Request No. 9 demands that Microsoft produce all "[d]ocuments sufficient to

9   show the existence of any restrictions or prohibitions imposed by SAP" on SAP's ERP

10   Applications. *See* Cross Decl., Ex. 1 at 16.  Teradata's motion incorrectly states that "Request

11   No. 9 seeks documents *recognizing* restrictions SAP places on exporting data," and that this

12   request "captur[es] other internal Microsoft documents recognizing the impact of SAP's

13   licensing restrictions on Microsoft and its customers." *See* Mot. at 10-11 (emphasis added).

14   Request 9 does not request Microsoft's *recognition* of any SAP restrictions; it simply asks for

15   documents showing the existence of any restrictions.  Teradata provides no explanation as to

16   why it cannot obtain SAP's restrictions from SAP.  *See Casterlow-Bey v. Trafford Publ'g*, 2017

17   WL 11358483, at *3 (W.D. Wash. Oct. 30, 2017); *Arista Records*, 2011 WL 679490, at *2.  And

18   even if this request could be construed to include internal Microsoft communications concerning

19   SAP's restrictions, it fails for the same reasons described above.

### 7.      Request Nos. 10 and 11

21       Although Teradata does not dispute that Microsoft's production satisfies Request Nos. 10

22   and 11, Teradata attempts to minimize the burden these requests already imposed on Microsoft

23   by incorrectly stating Microsoft produced "a mere 22 pages." *See* Mot. at 1.  Microsoft located

24   thousands of pages of materials and made them available for inspection on August 7.  Byer

25   Decl., Ex. 5.  Teradata's mischaracterization of Microsoft's efforts underscores the baseless

26   nature of Teradata's motion.

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## IV.     CONCLUSION

For the reasons stated above, Microsoft respectfully requests the court deny Teradata's

Motion to Compel.

DATED this 14th day of September, 2020.

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